

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JARED MICAH PEARSON,

Defendant-Appellant.

UNPUBLISHED

September 24, 2009

No. 284708

Kent Circuit Court

LC No. 07-009567-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of manslaughter, MCL 750.321¹. He was sentenced as a third habitual offender, MCL 769.11, to 14 to 30 years' imprisonment. We affirm.

In July 2007, defendant appeared at the home of Charles Lopez and the two engaged in conversation outside the home. Both had apparently been drinking. Lopez became angry when defendant began flirting with his girlfriend and an altercation ensued. At some point, a knife was produced and defendant fatally stabbed Lopez in the neck. Defendant fled the scene, but was arrested a short time later. He was charged with second degree murder and carrying a concealed weapon.

On appeal, defendant first asserts that he was denied a fair trial by instances of prosecutorial misconduct. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Defendant takes issue with the prosecutor's comments concerning defendant's failure to speak/assert to the police after his arrest that he had acted in self-defense, contending that the same was an impermissible comment on the exercise of his right to remain silent and

¹ The jury found defendant not guilty of carrying a concealed weapon (CCW).

additionally improperly shifted the burden of proof on self-defense. While defendant offers little by way of analysis on this issue, a brief review of his claims of prosecutorial misconduct establish that reversal is unwarranted.

During closing arguments, the prosecutor began to state that when defendant was in the back of the police car, that was his chance to say, “What am I doing here?” After objection by defense counsel, the trial court sustained the objection as to what defendant said before he was advised of his rights. The prosecutor then commented that if defendant had been attacked as he claims, “why didn’t he call the police and say, ‘This man just tried to kill me?’ . . . Never says to anyone—didn’t call 911 and say, ‘I had to do this.’” The first comment was duly objected to and sustained and there was no additional commentary concerning defendant’s failure to claim to the police that he was innocent. The second commentary did not constitute an impermissible reference to defendant’s post-arrest silence; instead, the prosecutor’s comments focused on defendant’s actions immediately after the incident took place thereby bringing into question defendant’s intent.

With respect to defendant’s claim of burden shifting on the issue of self-defense, the prosecutor properly analyzed the considerations of self-defense during her closing argument, drawing upon the facts and evidence presented at trial. After evidence of self-defense was introduced, the burden to exclude the possibility of the defense remained squarely with the prosecution and we see no indication that it impermissibly shifted. True, the prosecution commented that if in fact the incident was an act of self-defense, defendant could have told someone immediately after the stabbing took place or sought help. Again, however, this was not a specific comment on defendant’s post-arrest silence and was a fair inference in consideration of the facts and evidence. Ultimately, defendant failed to adequately explain how either of these allegations of prosecutorial misconduct deprived him of a fair and impartial trial, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), and he failed to establish an outcome determinative error under *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), or *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Next, defendant contends that the trial court gave a confusing jury instruction, which indicated that self-defense was a valid defense to second-degree murder, but failed to clarify that self-defense also applied to manslaughter. At trial, defense counsel expressed satisfaction with the trial court’s jury instructions, and thereby waived this issue. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Even though this issue is waived, in reviewing the jury instructions as a whole, we conclude that defendant failed to establish plain error affecting his substantial rights regarding this alleged instructional error. *Carines, supra* at 766-767.

The trial court carefully explained the applicability of self-defense, underscoring the point that self-defense applied to the second-degree murder count, and not to the CCW count. The trial court’s instructions clearly provided that the jury had three options with respect to the second-degree murder count: “You can either find the defendant not guilty, you can find the defendant guilty of second-degree murder, or you can find the defendant guilty of voluntary manslaughter.” The trial court then explicitly stated, “self-defense is not a defense to Count Two, carrying a concealed weapon, but it is a defense to Count One, where second-degree murder is charged and voluntary manslaughter is charged as a possible lesser offense.” The above sufficiently expresses that self-defense is applicable to the entirety of count one, explicitly including voluntary manslaughter as a lesser offense. Additionally, there is no indication that the

jury was confused regarding the trial court's instructions; rather, the jury's notes to the trial court suggest that they carefully scrutinized the evidence to determine, which of the available options for count one applied to the instant case.

While the trial court could have used more precise language in explaining that self-defense could excuse manslaughter, "even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). Examining the jury instructions as a whole, we conclude that the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Next, defendant claims that the sentencing court made an improper finding that defendant was guilty of CCW, despite the jury verdict to the contrary. However, a review of the sentencing transcript reveals that the trial court made no such finding. At sentencing, defense counsel argued that "somehow a knife came about" and that because the jury found defendant not guilty of carrying a concealed weapon "the knife had to come from the victim." The sentencing court rejected defense counsel's position, opining that "the fact that the jury chose not to find [defendant] guilty beyond a reasonable doubt of carrying a concealed weapon is not a finding that he did not have a weapon." The sentencing court then imposed defendant's sentence. Defendant and defense counsel raised no objections to that sentence. As can be seen above, the trial court made no independent finding that defendant carried a concealed weapon. The court's comment instead acknowledges what the unrefuted evidence established at trial—that at some point, defendant possessed a knife (and stabbed the victim with it).

Defendant also briefly (in essentially one sentence) argues that his minimum sentence of fourteen years was excessive and constituted an abuse of discretion. Not only is this issue unpreserved, the allegation of error is meritless. First, defendant does not allege any scoring errors nor does he contend that the sentencing court relied upon inaccurate information. Second, according to defendant's Sentencing Information Report, his guideline minimum range was 58 to 171 months; and he was sentenced to a minimum of 168 months. Because defendant's minimum sentence fell within the appropriate guidelines range, and there was no scoring error or reliance on inaccurate information, we affirm defendant's sentence. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant raises additional issues in his standard 4 brief, all of which lack merit. First, defendant presents additional claims of prosecutorial misconduct, claiming that the prosecutor presented perjured testimony from two witnesses and improperly vouched for the credibility of witnesses. Prosecutors "may not knowingly use false testimony to obtain a conviction," and they have "a duty to correct false evidence." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

In claiming that certain witnesses committed perjury at trial, defendant cites only inconsistent testimony related to collateral matters. While some of the testimony may have been inconsistent, there is no record support for defendant's contention that the prosecutor knowingly presented false testimony. Indeed, defendant concedes that "it cannot be said whether the Prosecutor knew the witnesses were lying." Moreover, defendant was given ample opportunity to impeach the witnesses and the prosecutor and defense counsel argued extensively regarding

the credibility of the witnesses. Ultimately, assessing witness credibility is within the province of the jury. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Based upon the above, we conclude that defendant failed to establish plain error. *Carines, supra* at 763-764.

With respect to defendant's additional allegation of prosecutorial misconduct, it is well established that the prosecution may not vouch for the credibility of its witnesses, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). It may, however, argue a witness's credibility based on the facts and evidence in the case. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Here, there is no indication that the prosecutor improperly vouched for any witness's credibility or suggested that the government possessed special knowledge that a given witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Rather, the record demonstrates that the prosecutor argued that the witnesses for the prosecution were credible witnesses based upon the facts and evidence of the case. *Howard, supra* at 548. The prosecutor commented that the witnesses were all part of the same family and if they had wanted to falsely accuse defendant, they had plenty of time to agree upon a version of events that placed the knife in defendant's hand from the beginning—but that they did not. This observation was consistent with the evidence at trial. Moreover, defendant did not object to the misconduct, therefore, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The trial court instructed the jury at the conclusion of trial, in part, that the arguments of the attorneys did not comprise evidence, that they were only to consider the evidence admitted at trial, and that they were to decide which witnesses were credible. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant alleges in his standard 4 brief that defense counsel rendered ineffective assistance of counsel by expressing satisfaction with the jury instructions despite the fact that the trial court failed to instruct the jury that self-defense excused or justified manslaughter. As discussed previously, however, the trial court's jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Martin, supra*; *Aldrich, supra*. Any objection would have been futile; thus, defendant's claim of ineffective assistance of counsel must fail. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra